

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section 309(j) ) PP Docket No. 93-253  
of the Communications Act )  
Competitive Bidding )

COMMENTS OF ALLIANCE FOR FAIRNESS AND VIABLE OPPORTUNITY

The Alliance for Fairness and Viable Opportunity (AFVO) hereby files its comments in the matter of competitive bidding procedures, pursuant to and in furtherance of the F.C.C.'s Notice of Proposed Rulemaking, released October 12, 1993 (NPRM).

AFVO commends the Commission on its effort to comply with the statutory mandates of the Communications Act as well as those set out in the Omnibus Budget Reconciliation Act of 1993 (Budget Act). We especially congratulate the Small Business Advisory Committee for its work in this proceeding.

The Commission has correctly observed that the development of personal communications service (PCS) is a pivotal component for evolving telecommunications markets,<sup>\*/</sup> both in the domestic and international sectors.

<sup>\*/</sup> E.g., Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd \_\_\_, October 22, 1993 (PCS Report and Order).

Of additional significance is the broadly held expectation that PCS will create new market opportunities and, in general, greater sophistication in telecom service offerings.

Because of the anticipated market impact - along with the flexibility of PCS technology -- an accelerated processing or licensing period has emerged. Left unsaid, but fundamental to this determination, is also the fact that accelerated licensing results in almost immediate and new dollars for the national treasury.

AFVO appreciates many of the complexities burdening the Commission vis-a-vis this proceeding. At the same time, however, we caution that the headlong rush to comply with the timing mandates of the Budget Act should not be undertaken at the expense of fundamental principles of fairness, and must not contravene other statutorily mandated requirements.

Put differently, the statute requires the Commission to, inter alia, ensure that licensing procedures for PCS promote an equitable distribution of licenses and assures economic opportunity for applicants owned by minorities and women, as well as small businesses and rural telephone companies. Some proposals and/or presumptions raised by the Commission in its NPRM seriously jeopardize this basic tenet. It is those matters AFVO seeks to address through these Initial Comments.

I. BACKGROUND

1. AFVO

AFVO is a group of small companies owned by persons normally classified as "minority". In sum, AFVO is comprised of persons of color who own, or are the majority owners of various businesses. The Alliance also has individual members.

2. Procedural Objectives

Through its NPRM, the Commission seeks to address certain provisions set out in Section 309(j)(2)(B) of the Budget Act, and otherwise address congressionally mandated goals, thus including it is objectives:

- (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- (D) efficient and intensive use of the electromagnetic spectrum.

NPRM at 5.

In addition to the foregoing statutory requirements, the Commission also notes that it is required to:

- (A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;
- (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;
- (C) consistent with the public interest, convenience and necessity, the purposes of this Act [Budget Act], and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in rapid deployment of new technologies and services;
- (D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures; and
- (E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment As a result of the methods employed to issue license and permits.

NPRM at 5.

### 3. Saying It Does Not Make It So

Some provisions contained in the proposals, though assuredly unintentional, will likely produce results inconsistent with the statutorily mandated goals set out above. Still other proposals contained in the NPRM are founded upon erroneous or otherwise baseless presumptions and are wholly irrelevant for any framing of licensing guidelines.

AFVO is unalterably opposed to proposals or procedures which are violative of statutorily mandated requirements and portend to:

- (i) Punish a designated entity solely because of its status;
- (ii) Effectively restrict designated entities to designated block areas; and
- (iii) Effectively frustrate financing options of designated entities.

With specificity, this includes the following matters, which are categorically discussed under Section II, infra:

- (a) The false presumption that unjust enrichment is likely to be a problem "only" in auctions involving designated entities is not only patently unfounded, but also objectionable and offensive. (This fallacious postulation is used as a basis for developing proposals to impose sanctions on designated entities for premature transfers, although other entities involved in the same set of facts face no such sanctions);

- (b) The notion of favoring aggregation effectively means that small companies are limited in practical bid opportunities;
- (c) Inconsistent assumptions regarding auctions (i.e., the Commission argues in some instances that the party who values the license most will pay the highest figure, and in other instances presumes just the opposite (cf. paragraphs 34 62 and 83). The problem here, of course, is that it raises price beyond then present value, thus undercutting an ability to finance the acquisition.)
- (d) Payment provisions favor those with "deep pockets" and do not necessarily achieve the highest return for the treasury; and
- (e) Business classifications which invite sham applicants (i.e., a corporate restructuring which permits an otherwise large company to participate in designated area bids, but obviously carrying the banking and financial relationships of the parent).

## II. LEVELING THE PLAYING FIELD

It is axiomatic that AFVO members, and other smaller companies, start with distinct disadvantages in this licensing proceeding. We have less resources than multi-billion companies, and less access to capital; there are also, perhaps, less opportunities for smaller entities to strategize vis-a-vis PCS licensing. In sum, we recognize there are are some monetary ceilings on our ability to compete. It needs to be stated here, however, that such shortcomings do not extend to character, desire nor ability to compete.

For this reason alone, we would urge the Commission to set aside any future suggestions that somehow applicants controlled by persons of color or women, or small businesses, and rural telephone companies will be less serious than their larger competitors.

(a) Defining Unjust Enrichment

The Commission has adopted in this rulemaking a provision from the House Report on the subject of unjust enrichment. As it interprets the language, the Commission concludes that unjust enrichment is "...likely to occur only in auctions where participation is limited in order to ensure designated entities' opportunity to participate." (NPRM at 28)

In the most charitable light, AFVO can only suggest that the Commission misread that Report.

In its relevant part, the House Report notes as follows:

...[T]he Committee anticipates that the Commission will monitor trafficking in licenses issued pursuant to the provisions of Section 309(j), and will impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment. In the event that the Commission limits participation in any given competitive bidding procedure, however, there exists a significant possibility that licenses will be issued for bids that fall short of the true market value of the license. To the extent that the Commission is

attempting to achieve a justifiable social policy goal--such as the reservation of appropriate licenses for small business applicants--licensees should not be permitted to frustrate that goal by selling thier license in the aftermarket

H.R. Rep. No. 103-111 at 257.

It is clear from any literal reading of this document the House Report neither says nor implies what the Commission has ascribed to it.

What is more puzzling, however, is the fact that the Commission has chosen to elevate this quote out of the legislative hierarchy; that is, why extract this item from the House Report when the more preferred legislative source (Conference Report) is available.

Clearly the Commission erred in its reading of this part of the House Report. Beyond that, however, there is no empirical evidence supporting this presumption, nor is any other support offered.

Finally, the issue of trafficking in licenses, AFVO submits, is applicable to all licensees. Hence, restrictions on transfer(s) should apply equally to all licensees, without regard to company size, auction in which the applicant participated or spectrum/block covered by the license.



(b) Assumptions on Value

AFVO would urge the Commission to abandon the presumption that a smaller universe of bidders necessarily means that the value of the spectrum diminishes. There is ample basis for this request since the Commission generally presumes that the applicant who values the frequency most will pay the highest price. (NPRM at 12)

Such a presumption is also injurious to those in the designated entity category since it increases the likelihood that such companies may be closed out of opportunities which may otherwise be available. An example of this is highlighted in paragraph 62 of the NPRM, and the accompanying presumption that fewer bidders translates into something less than fair market value. Hence, to remedy this presumed problem, the Commission is considering a mechanism which would otherwise fair market value (i.e., a higher price).

In contradistinction, the lack of a large number of bidders may simply be reflective of the fair market value. As well, it may also be in these "sleeper" markets where the designated entities will have a viable opportunity to compete with all others.

For this reason, we would urge the Commission to resist the temptation to place some external value on markets for purposes of establishing a minimum bid. The operation of such a rule, we submit, may prove counterproductive to the statutorily mandated goal of maximizing opportunity for all.

(c) Sham Applicants

AFVO would urge the Commission to establish firm guidelines for companies seeking to qualify for any designated category. In doing so, such guidelines must consider the following:

- (1) the ownership of the company;
- (2) the relationship of the company to a present or prior parent (i.e., is it newly created with banking relationships of parent, or was it recently spun off and, if so, does it retain a relationship sufficient to have it viewed as the alter-ego of the parent for PCS purposes); and
- (3) the control of the company.

Beyond the foregoing, AFVO would also take this opportunity to comment on some additional areas, although in summary form.

(d) Payment Considerations

The Commission should develop payment guidelines maximize the opportunity for companies in the designated company to effectively compete.

Since the Commission presumes that he who values the frequency most will pay the highest price, it should consider more seriously the possibility of royalties. Most assuredly, it will likely generate higher revenues in the long-term if the market appreciates in value as most experts predict.

AFVO does not accept the premise that a business or business person would intentionally suppress productivity simply to avoid a higher royalty payment to the F.C.C.

(e) Ownership

AFVO supports the proposition that any entity seeking to qualify under the designated category as minority or women controlled, minimally, have 51% ownership vested in such group or category.

(f) Small Business

The Commission should look beyond the SBA standard regarding small businesses in view of the fact that some larger companies have begun the process of spinning off operating branches, presumably, in anticipation of the PCS licensing.

(g) Financial Certification Guidelines

AFVO supports the recommendations of the Small Business Advisory Committee regarding a stream-lined process, and the acceptability of relying on "highly confident" letters obtained by applicants from Small Business Investment Companies.

(g) Short Form Applications

AFVO support the Commission's proposal to permit short-form applications for purposes of PCS licensing.

(h) Upfront Payment Requirements

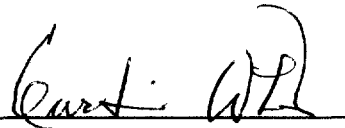
A small upfront payment requirement does not raise the spectre of less than serious applicants, as some may suggest. Rather, it increases the likelihood that the Commission will achieve its statutory goal of maximizing diversity of grant of PCS licenses. Moreover, the safeguards now proposed are more than sufficient to protect the process from less than serious applicants.

CONCLUSION

For all of the foregoing reasons, we would urge the Commission to ensure that the PCS licensing process maximizes every opportunity to balance the process, thereby ensuring that it will achieve an equitable and diverse distribution of PCS licenses.

Respectfully submitted,

AFVO

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